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CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1946.

No. 710

EDWARD SCHWARZ, JEREMIAH LOTT, JOSEPH K. BROWN, DOROTHY O. HAMSTRA and MAPLECREST CIVIC ASSOCIATION,

Petitioners,

v.

TOWNSHIP COMMITTEE OF MAPLEWOOD, NEW JERSEY, BUILDING INSPECTOR OF MAPLEWOOD, NEW JERSEY, and the FEDERAL PUBLIC HOUSING AUTHORITY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

HARRY V. OSBORNE, JR., and
ABRAM H. CORNISH and A. HARRISON CORNISH, JR.,
Counsel for Respondents, Township Committee of Maplewood, New Jersey and Building Inspector of Maplewood, New Jersey.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton St., Newark 5, N. J., U. S. A.

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Petitioners,

v.

TOWNSHIP COMMITTEE OF MAPLEWOOD, NEW JERSEY, BUILDING INSPECTOR OF MAPLEWOOD, NEW JERSEY, and the FEDERAL PUBLIC HOUSING AUTHORITY,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

I.

Statement of Facts and Issues.

The application of the petitioners is based on the contention that the refusal of the Supreme Court of New Jersey to issue a writ of certiorari denied the petitioners the equal protection of the law, deprived them of property without due process of law and impaired the obligation of their contracts in violation of Article I, section 10, cl. 1; and the 14th amendment of the Constitution of the United States.

The controversy concerns the following circumstances. By Chapter 79, Laws of 1946 the New Jersey Legislature found and declared that an emergency exists in the total

lack of safe, sound and sanitary dwellings for families of veterans of World War II and authorized municipalities to provide temporary housing for veterans of World War II and for that purpose to enter into contracts with the Federal Government. Pursuant to such authority, the defendant, The Township Committee of Maplewood, New Jersey, the governing body of that municipality, on July 23, 1946, adopted two resolutions; (R. 22 to 24 and 24 to 26), one declared that a housing emergency existed in the community and provided for housing with public funds and the other authorized the execution of a contract (R. 27 to 45) by the municipality with the Federal Housing Authority by the terms of which the Authority agreed to erect temporary dwellings for 18 families on a site to be provided by the municipality. The contract was actually executed on July 25, 1946, and a site situated in a triangular portion of Maplecrest Park bounded by Springfield Avenue, Tuscan Road, Tuscan Street and Vermont Street in Maplewood was tentatively agreed upon by the members of the governing body but no official action had been taken to designate the site.

On August 21st, 1946, petitioners, the owners of property abutting the park area, obtained, on ex parte application to the New Jersey Supreme Court, a rule to show cause, with restraining order, why a writ of certiorari should not issue to review the two resolutions and contract above mentioned and the actions of the Township Committee and Building Inspector of Maplewood taken pursuant thereto. The rule was returnable October 1, 1946. On September 30, 1946, Chapter 321 of the Laws of 1946 was enacted as an amendment to Chapter 79, Laws of 1946 and contained among other provisions the following:

> Section 4. "Notwithstanding the provisions of any zoning or other municipal ordinance or build-

ing code to the contrary, the governing body of any municipality may, in its discretion, provide by resolution for the erection or reconstruction of any portable or temporary or movable dwelling unit or units, whether purchased or acquired from the Federal Government, or from the State Government, or otherwise, in or upon any area within such municipality, including any lands of such municipality held by it for park or other public use."

On October 23, 1946, the Supreme Court of New Jersey dismissed the rule to show cause but without prejudice to its subsequent renewal if, after the emergency had passed, the temporary structures were not removed from the park. The restraint was continued on petitioners' application pending application to this Court for a writ of certiorari.

The controversy on this application revolves around the proposed use of the triangular park area mentioned.

II.

Argument.

POINT A.

The petitioners have no property rights in nor in respect to the park area in question.

The record shows (Exhibit P 4, R. 124 to 127) that the area in question was purchased by the municipality in the year 1912 from William W. Trimpi *et al.* for a consideration of $5,000.00. The grant and habendum were in fee. The deed contained a covenant in the following words:

> "This conveyance is made and accepted upon the express covenant that the premises herein mentioned are to be used only for the purpose of a Public Park and for no other purpose."

The premises were described in said deed by metes and bounds and, by reference, as lots 3 to 18 both inclusive, as shown on a certain filed map of the grantors. Nowhere does it appear that the tract was shown on that map as a park area.

The grantors in the deed are not parties to this proceeding.

Nowhere in the record does it appear that these petitioners or any of them have succeeded to any rights of the grantors in the deed in respect to the covenant in question.

Where, as in this case, the grantors in the deed containing the covenant are not parties to the proceeding and where, as here, the persons seeking to enforce the restrictive covenant have not succeeded to any rights of the grantor, and therefore have no privity either of legal estate or of contract with the grantor or covenantor and where, as in this case, there is no proof of the existence of a general scheme for the improvement of a neighborhood, the petitioners have no right to enforce the covenant *Bright* v. *Forest Hill Park Development Co.,* 133 N. J. Eq., page 171, *DeGray* v. *Monmouth Beach Club House Co.,* 50 N. J. Eq. 329. Nor do the petitioners acquire any property right protected by the Federal Constitution, from the dedication of the park alone or from the mere fact that their lands abut upon the park *Reichelderfer* v. *Quinn,* 287 U. S. 315, 77 L. Ed. 331.

POINT B.

Having no property rights in the park area nor in the covenant, petitioners cannot be said to have been deprived of property without due process of law nor can they be said to be deprived of the equal protection of the laws by breach of a covenant not made for their benefit, nor can they complain of the impairment of a contract in which they have no interest.

The situation here is in all essential legal particulars the same as that before this court in *Reichelderfer* v. *Quinn, supra.* That case concerned the locating of a fire engine house in Rock Creek Park, Washington, D. C. The petitioners in that case were owners of properties adjoining that park and their properties had been assessed for benefits arising from its establishment. It is important to note that in the *Reichelderfer* case the diversion from park uses was to be a permanent one while in the case now before the court, the proposed use of the park is temporary to meet a declared and existing emergency.

The question before the court in the cited case was whether the petitioners were vested with the rights for which they sought constitutional protection (p. 317).

The court held,

1: That the property owners derived no rights against the government from the dedication of the park alone (p. 318);

2: That the existence of an increase in value from the near location of the park alone did not generate interests protected by the constitution against diminution by the government however unreasonable its action might be (p. 319);

3: That an abutting owner cannot complain because of the fact, the damage suffered by the change in use being greater in degree but not different in kind from that of the rest of the public (p. 320).

The case reversed a decree of the Court of Appeals of the District of Columbia, which had followed the earlier decision of *Quinn* v. *Dougherty,* 30 F. (2nd) 749. That case is cited by petitioner (brief, p. 25) in support of the argument that the government is estopped from changing a public use where adjoining property had been enhanced in value by establishment of the use.

Petitioners also cite *Cincinnati* v. *White,* 6 Pet. (U. S.) 431; 8 L. Ed. 452 and *Davenport* v. *Buffington* (C. C. A. 8th) 97 Fed. 234 in support of their contention that the surrounding land owners have rights protected by the Federal constitution.

The first case mentioned was an action of ejectment by a claimant who set up a title derived through mesne conveyance from the patentee. The City of Cincinnati, defending, claimed under a dedication to public use as a common. This defense was upheld by the Court and in the course of the opinion the Court said (p. 438):

> "And after being thus set apart for public use, and enjoyed as such, and private and individual rights acquired with reference to it, the law considers it in the nature of an estoppel in *pais,* which precludes the original owner from revoking such dedication. It is a violation of good faith to the public, and to those who have acquired private property with a view to the enjoyment of the use thus publicly granted."

The point determined by the decree was that the plaintiff was not entitled to a judgment for ejectment. The statement quoted was not necessary to the decision and certainly

is not a precedent for the theory that mere ownership of property in the vicinity creates a property right in the park protected by the Federal Constitution. In any event the later case of *Reichelderfer* v. *Quinn* (*supra*) specifically holds to the contrary.

The case of *Davenport* v. *Buffington, supra,* merely holds, so far as relevant to the matter here in controversy, that a taxpayer and resident of a municipality for whose benefit a public park had been dedicated had a sufficient interest in the park to maintain an action to prevent a diversion from the use for which the land was dedicated. It does not hold that adjoining land owners had any property rights protected by the Federal Constitution in or in respect to the park by reason of such contiguity. If it did so hold, it has been overruled by *Reichelderfer* v. *Quinn, supra.*

Petitioners also cite (brief, pages 22, 23 and 24) the following New Jersey cases in support of the same proposition.

Fessler v. *Union,* 67 N. J. Eq. 14, affirmed 68 N. J. Eq. 657;
Price v. *Plainfield,* 40 N. J. L. 608;
Bayonne v. *Ford,* 43 N. J. L. 292;
Barr v. *Belmar,* 116 N. J. Eq. 466;
Strock v. *East Orange,* 80 N. J. L. 619;
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Hill v. *Belmar,* 3 N. J. Misc. 254;
Trustees v. *Hoboken,* 19 N. J. Eq. 355;
Baird v. *South Orange,* 108 N. J. Eq. 91.

An analysis of these cases is attached hereto as Appendix A, and it will appear therefrom that in no case was it held that property rights in or in respect to the park arose through mere contiguity. The cases are therefore not in

point and do not support petitioners' contention that mere contiguity to a public park created a property right in or in respect to the park.

POINT C.

The petitioners here were not entitled as a matter of right, to have the points presented to the New Jersey Supreme Court determined by it.

Petitioners argue under their Point B (brief, pp. 31-32), that a court must determine all questions properly presented unless it is clothed with authority to decline to exercise jurisdiction and they quote from the remarks of Chief Justice Taney in the case of *Meyer* v. *Tupper,* 1 Black (U. S.) 522; 17 L. Ed. 180 at 183, that:

> "The court could not, consistently with its duty, refuse to exercise a power with which the constitution and laws had clothed it when its aid was invoked by a party *who was entitled to demand it as a matter of right.*" (Italics ours.)

Under the New Jersey law the allowance of a writ for certiorari is not a matter of right but rests in the sound discretion of the court. See *Post* v. *Anderson,* 111 N. J. L. 303, where it is said at pages 303-304:

> "The defendant applied to the Supreme Court for a writ of certiorari to review such conviction and that court denied the application. From that decision the defendant appeals. But an appeal will not lie to review the decision of the Supreme Court refusing to allow a writ of certiorari, such allowance *not being a matter of right* but resting in the sound discretion of the court." Citing *State* v. *Wood,* 23 N. J. L. 560; *Daniel B. Frazier Co.* v. *Long Beach,* 110 N. J. L. 221. (Italics ours.)

To the same effect is *Penn. R. Co.* v. *Public Utility Commissioners,* 116 N. J. L. 527. See also *Hillsborough Township* v. *Cromwell,* 326 U. S. 620.

Petitioners argue (brief, pages 31-35) that the denial of the writ by the New Jersey Supreme Court deprived them of rights guaranteed under the Federal Constitution, but they are arguing in a circle. If they have no such rights, as we have asserted, the denials by the New Jersey Supreme Court deprived them of nothing.

POINT D.

The decision of the New Jersey Supreme Court did not deprive petitioners of property without due process of law or deny them the equal protection of the laws. The decision merely postponed final determination.

The petitioners argue under Point B (brief 31 to 35), that the refusal of the New Jersey Supreme Court to adjudicate the many points presented to it by petitioners and the failure to render a decision in their favor deprived them of property without due process of law and denied them the equal protection of the laws.

The Rule of the Supreme Court entered on October 23, 1946, dismissed the Rule to Show Cause *without prejudice to its subsequent renewal* if, after the emergency had passed, the temporary structures were not removed from the park area. Its effect was to allow the temporary use of the park proposed by the municipality and to postpone further judicial inquiry until the emergency had passed. This did not constitute a denial of due process or of the equal protection of the laws. As stated by Mr. Justice Brandeis in *Phillips* v. *Commissioner of Internal Revenue,* 283 U. S. 589, 596, 597; 79 L. Ed. 1298, 1296, 1297; 51 S. Ct. 608:

> "Where only property rights are involved, mere postponement of the judicial inquiry is not a denial

> of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. *Springer* v. *United States,* 102 U. S. 586, 593, 26 L. Ed. 253, 256; *Scottish Union & Nat. Ins. Co.* v. *Bowland,* 196 U. S. 611, 631, 49 L. Ed. 619, 627, 25 S. Ct. 345. Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied."

See also *Bowles* v. *Willingham,* 321 U. S. 503, 88 L. Ed. 892 and *Yakus* v. *United States,* 321 U. S. 414, 88 L. Ed. 834.

POINT E.

The New Jersey Supreme Court has not suspended the Constitution.

Nothing would seem to be more fantastic than to soberly fasten on a facetious remark of the Justice who signed the order in the New Jersey Supreme Court to the effect that an application to this Court was justified to determine whether the New Jersey Supreme Court was justified in suspending the Constitution temporarily during an emergency.

And the citation of authority is to the Newark Evening News of October 24, 1946.

It seems to us that the references have no place in the record nor in the brief.

POINT F.

The petitioners were not deprived of rights guaranteed by the Federal Constitution, by failure of the municipal governing body to exercise the statutory powers conferred by R. S. 40:60-36.1 and R. S. 40:60-32 as amended.

Petitioners argue (brief, p. 36) that supposing the petitioners had no private right in the park lands in question nevertheless the failure of the municipality to follow the

procedure outlined in Sections 40:60-36.1 and 40:60-32, as amended, of the Revised Statutes of New Jersey deprived defendants of their constitutional rights.

To this argument there are two answers:

First: Neither of the statutes apply to the case under consideration. A reading of R. S. 40:60-36.1, cited by prosecutors as governing changes in the use of park lands, will show that the statute was enacted to provide for a special case. One of the conditions of its application is that "no improvements upon, damages to or changes in said lands have been made." The statute does not govern the use of the park site in question which was acquired by the municipality in 1912 and upon which many improvements and changes in the land have been made. Moreover that statute contemplates a permanent change; the present case contemplates a temporary change only.

So also, a reading of R. S. 40:60-32 discloses that it obviously has no application to the use of the park site in question. By its title and its terms the statute provides for a vacation of the public use in lands considered by the governing body of the municipality to be *unsuited to or undesirable for such use or otherwise burdensome or disadvantageous to the public and for the restoration of the same to the owner of the fee.* The temporary use of the park lands for the relief of public distress in an emergency (which is the situation in this case) is not inconsistent with a dedication of land for a public park or a covenant requiring such use. No change in the use of the park lands is proposed.

Second: Unless the petitioners have some private rights in the covenant, no constitutional rights are impaired, and

in such case maladministration of local affairs by the municipal officials does not concern the Federal Courts.

Owensboro Water Works Co. v. *Owensboro,* 200 U. S. 38, 50 L. Ed. 361;
Reichelderfer v. *Quinn, supra.*

POINT G.

The proposed use of the park area in the emergency caused by the housing shortage for temporary quarters for veterans, as proposed by the resolutions and contract under review does not constitute a violation of the dedication as a park nor of the covenant as to its continued use as such.

1

The police power of the state may in appropriate circumstances override contract rights.

Levy Leasing Co. v. *Siegel,* 258 U. S. 242, 66 L. Ed. 595.

This case involved the constitutionality of the New York emergency housing laws enacted after World War I. In upholding the constitutionality of the statute, the court (Mr. Justice Clark) says at pages 245 and 246:

> "In terms the acts involved are 'Emergency' statutes, and, designed, as they were, by the legislature, to promote the health, morality, comfort, and peace of the people of the state, they are obviously a resort to the police power to promote the public welfare. They are a consistent interrelated group of acts essential to accomplish their professed purposes.
>
> The warrant for this legislative resort to the police power was the conviction on the part of the state legislators that there existed in the larger

> cities of the state a social emergency, caused by an insufficient supply of dwelling houses and apartments, so grave that it constituted a serious menace to the health, morality, comfort, and even to the peace of a large part of the people of the state. That such an emergency, if it really existed, would sustain a resort, otherwise valid, to the police power for the purpose of dealing with it, cannot be doubted, for unless relieved, the public welfare would suffer in respects which constitute the primary and undisputed, as well as the most usual, basis and justification for exercise of that power. * * *
>
> * * * If this court were disposed, as it is not, to ignore the notorious fact that a grave social problem has arisen from the insufficient supply of dwellings in all large cities of this and other countries, resulting from the cessation of building activities, incident to the war, nevertheless, these reports and the very great respect which courts must give to the legislative declaration that an emergency existed would be amply sufficient to sustain an appropriate resort to the police power for the purpose of dealing with it in the public interest."

In *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398, 78 L. Ed. 413, page 437, it is said:

> * * * "The economic interest of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." * * *

See also *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 81 L. Ed. 703.

2

The general public may be temporarily excluded from park areas in the interest of public health, safety or welfare.

In *Strock* v. *East Orange*, 80 N. J. L. 619 the Supreme Court of New Jersey stated (p. 622):

> "So also, the authorities may even exclude the general public for a time and restrict the use of the park for that period to a limited portion of the public, so long as the length of time is not unreasonable."

In 39 *Am. Jur.* 820 in an article on "Parks, Squares and Playgrounds", the following is said as to permissive uses of parks not strictly in conformity with the primary use of public recreation and amusement:

> "Leases of portions of a public park for hotel purposes, for the purpose of selling refreshments, and for the establishment and operation of a race track, have been upheld as not inconsistent with the public use. The use of portions of public parks for agricultural purposes, zoological and botanical gardens, conservatories, and many other similar recreational and educational facilities, has also been held, in various instances, to be a proper and legitimate use. The use of the whole of a small park, in reality forming part of a larger park, for the purpose of parking automobiles, has been held to be a beneficial use incident to the use of the larger park. Such incidental use has even been held to extend to the sale of gasoline, although not to the sale of refreshments and automobile accessories. The building of cottages for tourists and the maintenance of tourist camps has been held not to constitute a diversion of property devoted to park purposes. Under the terms of a dedication for public use or purposes generally, a pesthouse is a public purpose for which the park may be properly used temporarily in an emergency. The devotion of a reasonable portion of a public park to use as an airport for recreation and other

> attendant purposes has also been held to be within the proper and legitimate uses for which public parks are created. Parks, squares, and commons may properly be used to a reasonable extent for the purpose of meetings, public addresses, parades and similar group activities of a lawful character, subject to reasonable regulations promulgated by the public authority."

The contract entered into between the Township Committee of the Township of Maplewood with the United States states in the second paragraph (R. 27) that one of its considerations is,

> "for the purpose of carrying out the provisions of Title V of the Lanham Act (Public Law 849, 76 Congress as amended)."

That act, as amended, provides among other things, for the transfer of temporary housing

> "To any educational institutions, State or political subdivision thereof, local public agency, or non profit organization for use or re-use in producing temporary housing for families of service men, for veterans and their families, or, in the discretion of the administrator, for single veterans attending educational institutions." (Title 42 U. S. C. A. 1572 (c))

The contract, in Part III, dealing with the disposition and removal of the housing units, provides (R. 43) that the same shall be removed from the sites selected

> "within two years after the *termination of the emergency* declared by the President to exist on September 8, 1939, provided that such period for the removal of such dwelling accommodations or of appropriate parts therefor shall be extended for successive

> periods of one year each upon a determination by the National Housing Administrator (after consulting with the local body and the local community) that such housing is still needed to provide housing for eligible tenants *in the interests of the orderly demobilization of the war effort* • • • ". (Italics ours.)

Chapter 79 of the Laws of 1946, under which the municipal authorities entered into the contract under discussion, in its first section (Title 55:15 F-1) reads, in part

> "It is hereby found and declared that the discharge of veterans engaged in world war II has resulted in the return to civilian life, in large numbers, of many persons for whom no adequate dwellings exist, and that an emergency exists in the total lack of safe, sound and sanitary dwellings for families of veterans of world war II and other citizens of this state, which causes untold hardship, overcrowding of existing dwellings, the occupation of substandard and insanitary houses, and creates a menace to the health, safety and moral and general welfare of the people, that it is vitally important that action be taken to provide adequate housing for such veterans and their families and for other citizens in the state and for the governing bodies of the municipalities of the state to provide safe, sound and sanitary dwellings in this crisis • • •."

It is therefor evident that the purposes of the Federal Statute are to provide for: (1) the public health, safety, morals and general welfare, and (2) *the orderly demobilization of the war effort;* and that the purposes of the State Statute are to provide for: (1) *a present emergency due to the housing shortage* and (2) the public health, safety

and morals and general welfare; and that the statutory provisions, the resolutions under attack, and the contract authorize and contemplate measures temporary in nature to serve through the emergency.

We come, therefore, to these four controlling factors:

FIRST: *Permanent relief cannot be furnished for some time.*

SECOND: *Temporary housing must be resorted to.*

THIRD: *The Legislature, in its wisdom, has placed the responsibility on and conferred power on the several municipalities to provide the temporary housing.*

FOURTH: *The Legislature by the provisions of Section 4 of Chapter 321, Laws of 1946 (quoted herein under Statement of Facts and Issues) has authorized the governing bodies of the several municipalities in their discretion to use park lands for the erection of the dwelling units.*

To meet the responsibility thus imposed on them, the governing body of the Township of Maplewood entered into the contract with the FPHA and have determined, after careful investigation, that the best interests of the veterans and of the municipality as a whole would be served by the selection of the park area in question as a temporary site for the eighteen dwelling units covered by the contract. (See statement of Chairman of the Township Committee, R. 15 to 18 and 21 and 22.)

The same problem has arisen in other jurisdictions and in two cases recently decided, *Griffith* v. *Los Angeles, et al.*, Superior Court, Los Angeles County, Willis, J. (not yet officially reported) and *Hyland* v. *City of Eugene*, 173 Pac. (2d) 464 (Supreme Court of Oregon), the use of park areas

for such temporary housing units has been upheld in comprehensive and well reasoned opinions from which we quote in Appendix B attached hereto.

For the reasons stated in those cases we assert that the police power of the municipality may be resorted to for the purpose of diverting the use of the park area temporarily to provide suitable quarters for the families of needy veterans and that such diversion does not violate any private rights protected by the Federal Constitution.

Conclusion.

It is respectfully submitted that for the reasons hereinbefore set forth, the petition for writ of certiorari should be denied.

HARRY V. OSBORNE, JR., and
ABRAM H. CORNISH and A. HARRISON CORNISH, JR.,
Counsel for Respondents, Township Committee of Maplewood, New Jersey and Building Inspector of Maplewood, New Jersey.

Appendix A.

Analyses of Cases in Petitioners' Brief (pages 22, 23 and 24).

Fessler v. *Town of Union,* 67 New Jersey Equity 14. This was a case in equity to restrain a nuisance *purpresture* and to restrain a breach of trust by trustees. It concerned a plot of ground shown on a map of the same and surrounding property which designated the plot in such a way that the court concluded it was intended to be a public square. The court held, among other things, that an encroachment on a public square is an offense punishable by indictment only, and that one or more of the public cannot maintain an action or suit therefor unless he is individually and peculiarly injured thereby. That within the limits of the purposes and uses for which the dedication is made, the authority of the local governing body is unlimited, against which no mere private right can be set up. That the complainant was the owner of ten lots comprising a boundary of the square in question of one hundred and fifty feet in the immediate neighborhood of the tower in question, and the existence in that place of the tower and the ringing of the bell in case of fire, would produce an effect injurious to the enjoyment of complainant's property, different in a marked degree to that of the inhabitants generally.

It is thus seen that the action was founded rather on the theory of nuisance than on any special property right by reason of contiguity.

Price v. *Plainfield,* 40 New Jersey Law 608, was an action of ejectment and concerned the dedication of certain land to the public use as a park. No rights of adjoining property owners were involved in this case.

Barr v. *Belmar,* 116 New Jersey Equity 466. This was an action for an injunction to prevent the use of certain dedicated property for other purposes than that to which it was alleged to have been dedicated. The action was

brought by a purchaser of lots which showed the land in question in such a way as to, in the opinion of the court, constitute a dedication and the action was based on the theory that there was a violation of implied covenants in favor of the complainants as purchasers of lots from said maps in respect to the dedication of the aforesaid plot to the public use. The court sustained complainant's position as to their private interest, but the case differs from the one at hand in that it was an implied covenant arising from purchase of land originally in common ownership and shown on a map made for the purposes of sale as land reserved for public use.

Strock v. *East Orange,* 80 New Jersey Law 619. This was on certiorari to restrain certain alleged misuses of public play grounds. It does not appear from the case that the prosecutors founded their rights to bring the action on any grounds other than that they were members of the general public of the municipality.

Bozarth v. *Egg Harbor City,* 89 New Jersey Equity 26 was a bill for injunction brought by an individual who had purchased a lot shown on a filed map which also showed a plot designated as a park. It was held that under such circumstances there was a dedication of the part of the plot designated as a park to the public and that purchasers, buying lots identified by reference to the map, acquired a private right in the park plot in the nature of an easement.

Hill v. *Belmar,* 3 N. J. Misc. Rep. 254, was on an application for certiorari by individuals who purchased lots shown on a filed map on which there was also shown a park or a public square. The municipal authorities had proposed to convert the park into a swimming pool. The prosecutors contended that abutting owners suffered a pecuniary injury and that each derived their title through a common grantor and were therefore entitled to enforce the restrictions. The respondents contended that those reasons could not be properly urged in proceedings in certiorari. It was held, on the strength of *Ocean City Land Co.* v. *Ocean City,* 73 New Jersey Law 493 affirmed 75 New Jersey Law 942, that where

a diversion of use of land dedicated to a public use can only be made effective by infringing private rights, the ordinance providing for such infringement should be set aside.

Trustees v. *Hoboken,* 19 New Jersey Equity 355—Bill filed for injunction to restrain the city from using a tract dedicated as a public square for the erection of a city hall. It was held that while the legislature, in accordance with statutory authority could yield up the right of the public, it could not destroy the right of the owners of the surrounding lots. The rights of the complainant arose from the fact that the properties were shown on a filed map on which the public square was also shown and with reference to which map the lots were sold.

Baird v. *South Orange,* 108 New Jersey Equity 91, was a bill for injunction to restrain the playing of professional baseball on land dedicated as a public park. The complainant sued as a resident and taxpayer and member of the public whose property was alleged to be injuriously affected by the violation of the restriction. The conveyance contained a covenant that the premises conveyed shall be used solely as a public park or playground or for public park or playground purposes. The municipality had paid $71,300.00 for the property. Involved in the case was the question as to whether the playing of games on Sunday was or was not unlawful. It was held they were unlawful and should be enjoined.

One of the questions involved was whether or not the playing of such games was inconsistent with the purposes of the dedication of the park as a public playground and it was held that the use of land for games for which admission is charged was unlawful and an injunction was advised. The complainant sued first, in his capacity as grantor in the deed creating the dedication and restriction, second as a resident and taxpayer and member of the public at large and third as a private citizen whose peace and quiet and enjoyment of his home on the Sabbath were disturbed by the baseball games.

The facts in this case are somewhat similar to the case under consideration but with these distinguishing characters: first, the suit was in Equity, second the grantor in the deed for whose benefit the covenant was made was the complainant although he also alleged his interest by reason of his being a resident and taxpayer, third, no element of public use for temporary purposes to meet the need of a pressing emergency was involved.

Bayonne v. *Ford,* 43 N. J. Law 292, was an action of ejectment to recover a tract of land alleged to be a public park. The rule laid down in *Price* v. *Plainfield, supra,* was followed. Rights arising by reason of mere contiguity of adjoining premises were not involved.

Appendix B.

Opinion of Hon. Henry M. Willis, in Denying Temporary Injunction in Griffith vs. Los Angeles et al., Superior Court of Los Angeles County.

MEMORANDUM OF OPINION

Plaintiff seeks temporary and preliminary and ultimately a perpetual injunction against defendants' proposed action to appropriate to temporary use for housing of homeless war veterans and their families a portion of lands in Griffith Park, heretofore purchased by the City and dedicated by resolution to the use of the public as a public park. Upon the verified complaint a temporary restraining order was issued together with an order to show cause on March 8, 1946, why a preliminary injunction should not be issued restraining the defendants from using the park premises involved for the purposes proposed and now in actual operation. Shortly thereafter the judge who issued the temporary restraining order, on his own motion, vacated the same and reissued the order to show cause.

The land proposed to be used for the purpose of housing returned World War II veterans and families is part of a tract of 350 8/10 acres acquired by the City of Los Angeles by purchase on April 29, 1921. Thereafter, on June 15, 1921, the City Council by resolution duly dedicated the lands so acquired "for the use of the public as a public park", and placed the same under the general supervision and custody of the Park Department of the City as custodians thereof and authorized such Department to manage and control the same as provided by the Charter of the City and by ordinances enacted by the Council thereof. The Charter by Section 178 provides that "all lands belonging to the City which have heretofore or which may hereafter be set apart or dedicated for the use of the public as a public park, shall forever remain to the use of the

public inviolate," with certain exceptions and provisos not pertinent herein.

On January 28, 1946, the Council enacted ordinance No. 90074, to become effective immediately, wherein it was provided for the execution of an agreement between the City and the Housing Authority of the City of Los Angeles, California, providing for developing, acquiring and administering emergency housing projects and housing facilities by said Authority, and appropriating $100,000 for such purpose. The beneficiaries described therein are veterans of World War II and their families; families of service men distressed by reason of inability to find adequate, safe and sanitary housing; and persons evicted or about to be evicted from their places of residence by a public body. By Section 6 of said ordinance the City agrees to and does grant to the Authority the right to use the site of the airport at Griffith Park, consisting of about 160 acres, with appurtenances, as a temporary emergency housing project under the terms of the agreement, subject, however, to the approval of the Park Commission of the City and the consent of the State of California as to the use of the airport site. The ordinance declared that a serious condition exists within the City due to great influx of people due to war efforts, and the presence of large numbers of discharged members of the armed forces of the United States, who wish to reside here, combined with shortage of labor and building materials, resulting in lack of housing facilities inimical to public health and safety.

The uses to which park property may be devoted depend, to some extent, upon the manner of its acquisition, that is, whether dedicated by the donor, or purchased or condemned by the municipality. A different construction is placed upon dedications made by individuals from those made by the public. The former are construed strictly according to the terms of the grant, while in the latter cases a less strict construction is adopted (*Slavich* v. *Hamilton*, 201 Cal. 299, 303).

It is a well-settled principle of law that land which has been dedicated as a public park must be used in conformity with the terms of the dedication, and it is without the power of a municipality to divert or withdraw the land from use for park purposes. (*Slavich* v. *Hamilton, supra.*)

Herein the real question is whether the use designated by the City to be made for a temporary period of the lands in the public park in question is consistent or inconsistent with park purposes to which lands were dedicated.

It is a matter of public knowledge that the erection of hotels, restaurants, museums, art galleries, zoological and botanical gardens, conservatories, and the like, in public parks is common; and in the Slavich case, *supra,* the court approved the use of a public park as a site for the erection of a Veterans' memorial hall, as not inconsistent with park purposes. In the case of *Spires* v. *City of Los Angeles,* 150 Cal. 64, the court likewise approved the erection of a public library on a portion of Central Park, now Pershing Square in Los Angeles, long previously dedicated to the public for park purposes.

The uses to which public parks have been put in the past, with approval of the highest courts, when called upon to approve or disapprove the particular use in a given case, are varied and sometimes unique. The final test is whether the proposed use is consistent with park purposes as known to and practiced by the public and its constituted authorities over the long period of time in which public parks have been maintained. In the passage of time and under changing conditions, new and unexpected uses have been adopted and applied, some permanent, others temporary. The recitation above lists some of the many permanent uses to which public park lands have been put. A mere suggestion of one particular temporary use to which public parks have been put from time immemorial will suffice to remind us that the public has in the past recognized the propriety of such use, and thus satisfy the courts that such

temporary use is not unknown to or inconsistent with park purposes as that term in its broadest sense is understood.

This particular temporary use of a public park referred to is common to almost all communities containing such parks in every case of public calamity or sudden or unusual emergency which deprives the citizens, or a substantial portion therein, of a place of shelter and abode—of a place to sleep and live for the duration of the calamity or emergency.

One illustration, known to Californians generally, is sufficient to certify the point. In 1906 when earthquake and fire devastated the City of San Francisco, one of the first places to which the homeless were sent and kept was the public park in that city. For the duration of the emergency these park sites were the only homes or abiding places which occupants thereof had. No one ever claimed that such use was improper or inconsistent with park purposes. All over the world the same or similar uses have been made of public parks until it can be truthfully said that the public park in each community is the public place of refuge and temporary residence for the homeless, rendered such in time of emergency.

Since December 7, 1941, this United States has been engaged in war activities here, as well as in foreign territory. While the clash of arms and the roar of bombs have ceased, the conditions here at home have not remained in, or been restored to, the same status as before the war. One predominating result has been the shifting of civilian population from East to West, and the accumulation of persons in metropolitan centers where large industrial plants survive the war and supply a labor market. Added to such civilian accumulation are the returned and discharged members of the armed forces whose homes were temporarily lost by their call to serve their country, or whose wartime marriage have created a necessity for a home upon their discharge. Without any fault of his, the discharged service man returns to find all available places of residence

occupied, with thousands, both civilans and discharged service men unable to find a suitable place to live and estalish a home. The present situation in this respect in Los Angeles City is so well known that courts take judicial notice of it. Thousands of returned service men and women find themselves without a place to call ('home'), and with no reasonable expectation of being supplied with one within a reasonable time through private sources. Such a state of affairs constitutes a calamity, and creates an emergency which natural humanity, not to mention the gratitude of a patriotic people, requires shall be alleviated. Private industry has failed to cope with or cure the situation. Therefore the people—the public—must act. In this instance the municipality of Los Angeles, through its Council and its Board of Park Commissioners, in the exercise of power reserved in the dedication resolution, has undertaken to relieve the situation in some degree by temporarily erecting upon a few acres of park property houses obtained from the Federal Government, and renting their use to returned service men without pecuniary gain. The term for such use is limited and can never become permanent. The integrity of the park, of which these acres are a small part, is not affected, nor is any public enjoyment thereof diminished or destroyed.

The motive actuating this proposed use of this small portion of the park springs from the heart of a grateful public and reflects the highest sentiments of humanity and patriotism, and the purposes of its use cannot be characterized as inconsistent with park purposes.

The application for a preliminary injunction is therefore denied.

March 8, 1946.

HENRY M. WILLIS,
Judge.

Hyland v. *City of Eugene,* 173 Pac. (2d) 464 (Supreme Court of Oregon, October 22, 1946).

Suit to enjoin use of a public park to house World War II Veterans and their families on the ground that such use is inconsistent with the purpose for which the land was dedicated. Privately owned property was dedicated and accepted as a park in 1926. It was never developed by the City of Eugene. During the housing shortage the governing body, after considering many sites, selected this as suitable for FPHA trailer houses and leased the same to the Veterans of Foreign Wars for 100 trailer units for a term ending January 1, 1948. At the time of commencement of suit 60% of the trailers were installed and occupied.

Belt, C. J., at pages 466-468:

> "A park is a pleasure ground set apart for the recreation of the public and to promote its health and enjoyment. Williams *v.* Gallaten, 229 N. Y. 248, 128 N. E. 121, 8 ALR 1238. The word 'park' on a plot of land dedicated to the public, signifies a place open to every one and it carries no idea of restriction to any part of the public. *Price* v. *Inhabitants of City of Plainfield,* 40 N. J. L. 608; *Sanborn* v. *City of Amorillo,* 42 Texas Civil App. 115, 93 S. W. 473 * * *."
>
> "The extent to which the use of park property may be changed is governed, to some extent, by a consideration of the manner in which the property was acquired, whether by dedication by the owner or by purchase or condemnation by the municipality. In determining whether there has been a misuser or diversion of the property, courts are more strict in cases of grant by private owners.
>
> "If the project involved herein were of a permanent nature, we would have no hesitancy in the light of the above legal principles, to grant injunctive relief to these abutting owners. However, it is clearly established that this veteran housing project is only

to be maintained during a public emergency resulting from an acute housing shortage. It is only a temporary use of the park and does not substantially or materially interfere with the purpose for which the park was dedicated. To constitute a misuser or diversion there must be a substantial interference with the use of the land for park purposes. Not every invasion of property rights justifies such relief in equity. *Ludgate* v. *Somerville*, 121 Ore. 643, 256 P 1043, 54 ALR 837. There are times when property rights must yield to human rights. Injunctive relief depends upon broad principles of equity and may, in the discretion of the court, be granted or denied in accordance with justice and equity of the case. Many of these veterans and their families were occupants of these trailer houses at the time this suit was commenced. It would be shocking to the conscience of a court of equity now to compel them by a mandatory injunction to seek shelter elsewhere during an acute housing shortage. As stated in 28 Am. Jur. 213, Sec. 20, a mandatory writ is not regarded with judicial favor and is used only with caution and in cases of great necessity. The inconvenience and discomfort sustained by the plaintiff abutting owners by reason of this housing project is so slight compared to the hardship and injury which would result by the eviction of these veterans that equity should refuse injunctive relief. • • •"

"It is urged that there are sites available in the city of Eugene for these trailer houses and it is unnecessary to use a public park for such purpose. We believe the selection of a site is primarily a matter for the local officials, and this court, in the absence of an abuse of discretion will not interfere. In other words, sound exercise of discretion by local officials cannot be controlled by injunction.

"It is not unusual during public emergencies temporarily to use parks to relieve distress and suf-

fering. When the great San Francisco fire and earthquake occurred, rendering thousands of people homeless, the beautiful parks of the city were utilized to the full extent for hospital facilities, and no person had the temerity to contend that there was such a misuser of the parks as to afford equitable relief."

"In *City of Manhattan* v. *Hessin*, 81 Kan. 153, 105 P 44, 25 LRA N. S. 228, the right temporarily to maintain a pest house in a public park to guard against a threatened smallpox epidemic was sustained. The contention that such use was inconsistent with the purpose of the dedication was rejected."

"In *City and County of San Francisco* v. *Lenares*, 16 Cal 2d 441, 106 P 2d 369, 372 the right of the city to use the sub-surface of Union Square as a garage and parking station was challenged on the ground that it was 'detrimental to the original purposes for which such park was dedicated.' * * * The court * * * held that this interference was not of such nature as to constitute a misuser or diversion * * *."

"The suit for injunction is not dismissed. The plaintiffs have the right, without prejudice, to move for issuance of the writ when the emergency is terminated."